validity - S.I.
insurance proceeds
Findings of Fact w/ Conclusions of Law

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of: DARING SALES, INC. (Chapter 11 Case 89-41114) Debtor DARING SALES, INC. Plaintiff v. RESOLUTION TRUST CORPORATION, As Receiver for Great Southern Federal Savings and Loan Association; Trust Company Bank of Savannah; Huttig Sash and Door, Inc., and Suntec Paint, Inc. Defendants MILCO BUILDING PRODUCTS, INC. and CURTIS INDUSTRIES, INC. Intervenors	Adversary Proceeding Number 90-4121

FILED
at 10 O'clock & 11 min. A M
Date 11/30/90
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia PCB

MEMORANDUM AND ORDER

I. INTRODUCTION

The Debtor filed this adversary proceeding to determine the validity, extent, and priority of creditor liens which may attach to $501,180.20 representing insurance proceeds paid as a result of a fire on December 21, 1990, at Debtor's place of business. The proceeds have been paid into the registry of this Court. By Orders dated September 5, 1990, in Bankruptcy Cases 89-41114 (Daring Sales, Inc.) and 89-41113 (James Edward Daring) this Court approved the Debtor's settlement with Central Mutual Insurance Company, the Debtor's insurance carrier at the time of the fire. The insurance proceeds were designated by the insurance carrier, in accordance with the terms of the policy as follows:

Building	$197,474.06
Personal Property	$285,986.14
Computer	$ 15,820.00
Mobile Telephone/Radio	$ 1,900.00
Total	$501,180.20

It was undisputed that Great Southern Federal Savings and Loan Association ("Great Southern") is the holder of a first priority Deed to Secure Debt describing real property located at 3001 Montgomery Street, Savannah, Georgia. This Deed is collateral for the debt of Daring Sales, Inc., in the amount of $835,080.55,

which sum represents principal and interest only as of September 5, 1990, the date of the hearing in this case. It is further undisputed that James Edward Daring ("Daring") and Harold Joe Bacon ("Bacon") guaranteed the debt of Daring Sales and were or are the owners of the real property. Arthur Cardin now claims ownership of some portion of the property by virtue of a tax sale shortly before the bankruptcy filings of Daring and Daring Sales on July 31, 1989; as set forth below, however, a determination of the question of ownership is not essential to the issues presently before the Court.

The inventory and equipment were owned by Daring Sales subject to a blanket lien in favor of Great Southern perfected by a UCC-1 filing. Huttig Sash and Door, Inc. ("Huttig") also claimed an interest in a small portion of the inventory contending it held a purchase money security interest in $1,917.00 of goods which Huttig sold to Daring Sales on credit. According to Huttig, it complied with the provisions of O.C.G.A. Section 9-312(3) so its $1,917.00 claim would prime Great Southern's lien position.

The ownership of the computer equipment is in dispute in that Trust Company Bank of Savannah ("Trust Company") claims that it was the owner of the equipment while Great Southern contends the computer was owned by Daring Sales at the time of the fire and

therefore was subject to Great Southern's security interest.

Milco Building Products, Inc. ("Milco") claimed no interest in any of the property damaged or destroyed by fire, but contended that the insurance proceeds attributable to the personal property should not be paid to Great Southern and therefore are subject to Milco's administrative claim and/or its judgment claim against Bacon.

In essence, Great Southern holds a perfected lien on all of the real and personal property of Daring Sales which was damaged or destroyed in the fire and has requested payment of all of the insurance proceeds. With the possible exception of Arthur Cardin, no party has challenged Great Southern's contractual entitlement to the proceeds attributable to the building damage. Trust Company, Huttig and Milco have contested the priority of Great Southern's lien or claimed some portion of the personal property insurance monies. The positions of these creditors as well as other parties to this proceeding are set forth below with separate findings of fact and conclusions of law. To the extent that anything designated herein as a finding of fact addresses a question of law, it will be deemed to constitute also a conclusion of law. Similarly, to the extent that anything designated herein as a conclusion of law

contains questions of fact, it will be deemed to constitute also a finding of fact.

II. SUNTEC PAINT, INC.

This Defendant was properly served with a copy of the Complaint and Summons and Notice of Trial in this case but did not make an appearance or file pleadings with this Court. Consequently, this Court finds that Suntec Paint, Inc., has no claim to or interest in the insurance proceeds in question.

III. CURTIS INDUSTRIES, INC.

Curtis Industries, Inc., was permitted to intervene as a party Defendant in this case and was represented by counsel at the hearing held on September 5, 1990. This Defendant, which claims a judgment lien against Bacon, did not, however, present evidence of any lien or other interest in the insurance proceeds and therefore, this Court finds that Curtis Insurance, Inc., has no interest in the insurance proceeds in question.

IV. ARTHUR CARDIN

Arthur Cardin ("Cardin") who was not a named Defendant but who was served with copies of the Complaint and Summons and Notice of Trial appeared pro se at the hearing. He contended that

he is the owner of some portion of the real property by virtue of a tax sale purchase prior to Daring's bankruptcy filing and Cardin's post-petition foreclosure of the owners' bar of redemption. Setting aside, for the purposes of this order, the question of whether or not Cardin violated 11 U.S.C. Section 362 as contended by Daring, this Court concludes that any interest which Cardin may have in the property is subject to the interest of Great Southern, the holder of a deed to secure debt on the property and the named mortgagee on the insurance policy. Therefore, a resolution of Cardin's interest is not required in order to adjudicate the issues before the Court in this adversary proceeding.

V. TRUST COMPANY OF GEORGIA BANK OF SAVANNAH, N.A.

On May 19, 1987, Trust Company of Georgia Bank of Savannah, N.A. ("Trust Company"), as lessor, entered into a Master Equipment Lease with the Debtor, as lessee, pursuant to which the Debtor leased computer equipment for its use in the operation of its business. As provided for in the lease, the Debtor obtained insurance on the computer equipment, and caused Trust Company to be named as a loss payee on that insurance policy.

In the summer of 1988, the Debtor sustained a theft loss wherein part of the computer equipment leased to it by Trust Company

was stolen. At the time this theft loss occurred, the Debtor inadvertently neglected to notify Trust Company of the loss. The Debtor nonetheless proceeded to file a proof of loss and obtain payment from the insurance company for the stolen computer equipment. The Debtor then used the insurance proceeds to purchase replacement computer equipment.

James Edward Daring, President of the Debtor, testified that, in obtaining the replacement equipment, at all times it was his intention to act on behalf of Trust Company to obtain computer equipment to replace the equipment of Trust Company that had been stolen. Mr. Daring further testified that from the point of his purchase of that equipment forward, the Debtor never considered the equipment to belong to the Debtor, but instead to be the property of its lessor, Trust Company. The Debtor has never asserted ownership rights over the replacement computer equipment. In fact, following its acquisition of the replacement equipment, the Debtor continued to make payments on its lease of computer equipment to Trust Company throughout 1988. The Debtor also made lease payments in January and June of 1989.

Trust Company first learned of the theft of the computer equipment it originally leased to the Debtor in July of 1989 when

it sought to repossess its computer equipment because of the Debtor's default in its lease payments. Upon learning of the theft of the original equipment and the purchase of replacement equipment, Trust Company immediately notified the Debtor that it considered the replacement equipment to be subject to the lease and to be the property of Trust Company, and the Debtor immediately notified Trust Company of its agreement with that position. Both the Debtor and Trust Company have at all times considered the equipment to be the property of Trust Company Bank.

The Master Equipment Lease between the Debtor and Trust Company contained the following relevant provisions:

> Paragraph 9: . . . . All additions and improvements of any kind whatsoever made to the equipment shall become the property of Lessor when made.
>
> Paragraph 11: . . . . The proceeds of any insurance resulting from loss, theft or damage to equipment shall be applied toward payment of Lessee's obligations hereunder. Lessee irrevocably appoints Lessor as Lessee's attorney-in-fact to make any claim for, to receive payment for and to execute and endorse any documents, checks or other instruments in payment for loss, theft or damage under any such insurance policy, this power coupled with an interest.
>
> No loss, theft or damage to equipment or any part thereof shall impair any obligation of Lessee under this Lease, which shall continue in full force and effect.

> In the event of loss, theft or damage of any kind to any equipment, Lessee shall promptly notify Lessor of such loss, theft or damage, and at Lessor's sole option and direction, shall:
>
> (a) Place such equipment in good repair, condition and working order; or
>
> (b) Replace such equipment with like equipment in good repair, condition and working order and furnish to Lessor any necessary documents vesting good and marketable title thereto in Lessor unencumbered by any lien or security interest; or
>
> (c) Pay to Lessor in cash within ten days of Loss, an amount which shall be equal to the total rental due for the full term of this lease, less any payments made. Upon such payment, this Lease shall terminate with respect to such equipment and Lessee shall upon demand by Lessor return such equipment to Lessor 'as is' and at such location as Lessor shall designate if such equipment is still in the possession of the Lessee.

On July 31, 1989, the Debtor filed a voluntary petition for relief under the United States Bankruptcy Code. Subsequently, Debtor filed its Motion with this Court to assume its lease with Trust Company for the computer equipment. Trust Company opposed this Motion, and cited to the Court numerous events of default which would have to be cured prior to the Debtor assuming the lease. Negotiation between the parties ensued, and the Debtor subsequently determined that it was unable to meet its obligations under the

lease, and upon so advising Trust Company, Trust Company and the Debtor began to make arrangements for Trust Company to come to the Debtor's premises and repossess the computer equipment. Before arrangements could be made for Trust Company to pick up the computer equipment, it was destroyed in a fire occurring at the Debtor's premises on December 21, 1989. At the time of the fire, the computer equipment was insured under the Debtor's insurance policy with Central Mutual Insurance Company under a separate inland marine coverage part in the amount of $21,000.00. Trust Company was insured against loss to the computer equipment under that policy as a loss payee. Great Southern Federal was not an insured with respect to the inland marine coverage part insuring the computer equipment, nor was the value of the computer equipment utilized in settling the personal property coverage portion of the insurance claim as to which Great Southern Federal was a loss payee.

The computer equipment was completely destroyed in the fire, and a proof of loss was submitted to Central Mutual Insurance Company valuing the equipment at $15,820.00. Central Mutual Insurance Company has paid this claim in full into the registry of this Court under the inland marine coverage part of its policy covering the computer equipment.

Trust Company, as loss payee, is contractually entitled under the terms of the Debtor's insurance policy to payment of the computer equipment insurance proceeds. Great Southern Federal seeks to defeat Trust Company's entitlement to these proceeds by challenging the validity of Trust Company's insurable interest in the computer equipment on the ground that Trust Company is not the owner of the equipment. Under Georgia law, the question of lack of an insurable interest by an insured can be raised only by the insurer. It cannot be raised by an adverse claimant of the insurance proceeds such as Great Southern Federal. See, Clements v. Terrell, 167 Ga. 237, 145 S.E. 78 (1928); Townsend v. Morris, 222 Ga. 242, 149 S.E. 2d 464 (1966); Whitaker v. Ranow, 173 Ga. App. 746 327 S.E. 2d 855 (Ga. App. 1985).

Moreover, on the evidence presented I find that Trust Company clearly has an insurable interest in the computer equipment. Under Georgia law, an insurable interest in property is defined as follows:

> As used in this Code section, 'insurable interest' means any actual, lawful, and substantial economic interest in the safety or preservation of the subject of this insurance free from loss, destruction, or pecuniary damage or impairment. O.C.G.A. §33-24-4(a).

The Georgia Court of Appeals has characterized the test of insurable interest in property to be "whether the insured has such a right, title, or interest therein, or relation thereto, that he will be benefited by its preservation and continued existence, or suffer a direct pecuniary loss from its destruction or injury by the peril insured against." Farmers Mutual Fire Ins. Co., v. Pollack, 52 Ga.App. 603, 607, 184 S.E. 383, 386 (Ga. App. 1936). Under Georgia law title is not required to have an insurable interest, but only that the insured have an insurable interest in the property, whether it be "slight or contingent, legal or equitable." Cherokee Insurance Co. v. Gravitt, 187 Ga. App. 179, 369 S.E. 2d 779 (Ga. App. 1988).

There being no requirement in Georgia law that parties desiring to execute a conveyance of personalty commemorate their agreement in writing, and, as both the Debtor and Trust Company have testified that it was their intent that this property be the property of Trust Company, I find that the computer equipment was the property of Trust Company at the time of the fire, and that Trust Company had legal title thereto. This result is consistent with the lease terms which required the proceeds from the first loss to either be paid to Trust Company Bank or to be used to obtain replacement equipment which would be deemed the property of Trust

Company.

Trust Company is contractually entitled to the proceeds paid by Debtor's insurer for loss to the computer equipment in the amount of $15,820.00. This Court will not consider the complaint of any adverse claimant to those proceeds that Trust Company has no insurable interest, and in any event, this Court finds that Trust Company has an insurable interest in the computer equipment.

Since the computer equipment insurance proceeds are payable to Trust Company, a person other than a party to Great Southern Federal's security agreement with the Debtor, these proceeds are not UCC proceeds to which Great Southern Federal's security interest can attach. O.C.G.A. §11-9-306(1).

VI. HUTTIG SASH AND DOOR, INC.

Huttig supplied certain specified inventory to Daring Sales on credit prior to placing Daring Sales on a C.O.D. basis where payment was required at the time of purchase. In accordance with the provisions of O.C.G.A. Section 11-9-312, Huttig notified Great Southern, the holder of the prior blanket lien, of Huttig's intent to do purchase money financing, and it also filed a UCC-1. Huttig now claims that there was Huttig-supplied inventory having

a value of $1,917.00 on the premises at the time of the fire. In order to prime Great Southern's prior lien, it is incumbent upon Huttig to establish that: 1) its UCC-1 was filed and notice given to Great Southern prior to Daring Sales taking delivery of the inventory in question; and 2) the inventory which was damaged or destroyed by the fire was in fact the inventory supplied on a credit and not the inventory for which payment was made at the time of purchase.

The testimony of James E. Daring, the President of the debtor/corporation, established that the Debtor sold most of the merchandise it received from Huttig to its own customers in the usual course of its business. The debtor-in-possession used the proceeds of such sales to pay various bills and to acquire more inventory. However, Mr. Daring could not state with any accuracy what portion of the proceeds were actually used to acquire more inventory. Mr. Daring indicated that it was possible that all of the proceeds from the sale of Huttig's merchandise were used to acquire more inventory just as it was possible that none of the proceeds from the sale of Huttig merchandise were used to acquire more inventory.

Mr. Daring did identify certain merchandise that was provided by Huttig that remained with the debtor-in-possession. This merchandise had been damaged by smoke and fire. The value of the merchandise was $1,917.00 as set out in Huttig's Exhibit "A".

The invoice mentioned in the previous paragraph (Huttig Exhibit "A") identified various items of merchandise shipped to the debtor-in-possession by Huttig. A comparison of this summary with the earlier invoices introduced by Huttig (reference Order of March 29, 1990), clearly indicates that this is the same merchandise in which Huttig acquired a purchase money security interest.

The testimony presented by Huttig and the documentary evidence introduced by Huttig was uncontroverted by either the debtor-in-possession or by Great Southern.

As between Huttig and Great Southern, Huttig has a valid first lien as to the inventory it provided the debtor-in-possession. O.C.G.A. §11-9-312. The prior testimony in this case (reference earlier Order of March 29, 1990) established that Huttig had a purchase money security interest perfected at the time the debtor-in-possession received possession of inventory from Huttig; and that Great Southern had received timely notice of Huttig's intention to

obtain such a security interest. Therefore, as to the merchandise clearly identified as having been provided the debtor-in-possession by Huttig, Huttig is the first lienholder. This merchandise has been valued as being worth $1,917.00.

The merchandise provided the debtor-in-possession by Huttig was damaged by smoke and fire. As Huttig has the first lien interest as to this particular inventory it is entitled to receive the insurance proceeds. Insurance proceeds are considered "proceeds" within the meaning of the Commercial Code. O.C.G.A. §11-9-306(1).

VII. MILCO BUILDING PRODUCTS, INC.

Milco contends that those insurance proceeds attributable to the equipment and inventory should not be paid to Great Southern, the holder of a first priority blanket lien. According to Milco, the designation "mortgagee" as applied to Great Southern on the insurance policy restricts Great Southern's contractual interest in the insurance proceeds to those attributable to the real property. Milco further contends that Great Southern Federal would not be entitled to the insurance monies as the "proceeds" of the collateral because of the following language contained in O.C.G.A. Section 11-9-306:

> 'Proceeds' includes whatever is received upon the sale, exchange, collection, or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. Money, checks, deposit accounts, and the like are 'cash proceeds.' All other proceeds are 'noncash proceeds.'

According to Milco, Bacon and Daring as "additional insured" are third parties as contemplated by Section 9-306 so as to cause the personal property insurance monies to be payable to Bacon and Daring, who owned no interest in the damaged property, rather than to Great Southern, the holder of the perfected security interest.

In response, Great Southern contends that the designation "mortgagee" is not restricted to real property as Milco would suggest, citing a number of Georgia Statutes (such as O.C.G.A. §§44-14-45, 44-14-47 and 44-14-300) dealing with mortgages covering personalty. In addition, according to Great Southern, the policy itself indicates that Great Southern's contractual interest specifically relates to the building and contents while Bacon and Daring's interest as "additional insured" is limited to liability coverage and no property coverage.

For the following reasons, the Court finds that Great Southern's contractual interest in the insurance proceeds is not limited to the building or real property but also includes the personalty or contents.

The named insured on the policy is Daring Sales as evidenced on pages 1 and 6 of the insurance policy. The following language is contained at the bottom of the first page of the declaration page (policy page 6):

> These common declarations and the common policy conditions, together with the coverage part form(s) and endorsements, if any, issued to form a group thereof, complete the above numbered policy.

At the top of page 7 Great Southern, Trust Company, and Daring and Bacon are listed as mortgagee, loss payee, and additional insured respectively, with references beside each name to the form setting out that entity's coverage under the policy.

For determination of Great Southern's coverage, reference is made to Form 14-2010 (11-85), which form is found at page 9 of the policy. This form indicates coverage for both the building and the personal property. Similarly, Form 7-1250 (10-87)

found at page 49 refers to the Declarations (pages 7 and 35) which reveal inland marine coverage for Trust Company Bank in the amount of $21,000.00 on "mini/micro EDP" (presumably the computer). Form CG2011 (11-85) (GSF Exhibit "1"), referenced to the side of Bacon's and Daring's names provides for general liability coverage for "Managers and Lessor's or Premises." (Wally Hollinger, who was recognized by the Court as an expert witness in the field of insurance, and who also wrote the policy in question, testified that the designation "additional insured" within the insurance industry denotes a party with liability coverage only.)

Milco contends that the following language under the hearing "Mortgage Holders" on page 24 of the policy restricts Great Southern's coverage to the building only:

> We will pay for covered loss of or damage to building or structures to each mortgage holder shown in the Declaration in their order of precedence as interests may appear.

While that language standing alone could arguably restrict Great Southern's rights under the policy, the declaration page (page 6-7) taken together with Form 14-2010 (11-85) (page 9) indicate a clear intent to give Great Southern a contractual interest in any proceeds arising out of damage to the contents of the building as well. In

the construction or interpretation of contracts, the primary purpose, and foundation of all rules of construction, is to ascertain the intention of the parties. McVay v. Anderson, 221 Ga. 381, 144 S.E. 2d 741 (1965). It is a well established rule of construction that where there are inconsistencies between a part of a contract which is written or typed and a part of the contract which is printed, the written or typed provision will prevail. Olympic Const., Inc., v. Drywall Interiors, Inc., 180 Ga. App. 142, 348 S.E.2d 688 (Ga. App. 1986). Quinlan v. Bell, 189 Ga. App. 8, 374 S.E.2d 823 (1988); See Restatement, Contracts 2d; 17 Am. Jur. 2d "Contracts" §271. Consequently, to the extent a conflict exists between p. 24 of the policy which is pre-printed, and the declaration page (p. 7) which was typed for this contract in particular, the declaration page prevails. The declaration page (pages 6 and 7 of the insurance policy) clearly incorporates Form 14-2010 (11-85) so that Great Southern's contractual interest is as to the building and the contents in the amounts of $210,000.00 and $290,000.00 respectively.

This Court concludes that Milco's contention that the designation of mortgagee affixed to Great Southern by the insurance carrier or its agent restricts this interest to real property is not well taken in light of the provisions of the policy itself and

established principles of construction. This interpretation is buttressed by the Georgia statutes cited above recognizing mortgages on personalty as well as real property and by the testimony of Wally Hollinger who stated that the term "mortgagee" in the insurance industry does not restrict the coverage to real property and structures. Having so held, it is unnecessary to analyze O.C.G.A. Section 11-9-306(1) and the second part of Milco's argument. Accordingly, this Court finds that Great Southern's contractual interest in the insurance proceeds attributable to the building and contents, combined with Great Southern's perfected security interest in inventory and equipment and its deed to secure debt on the real property, result in Great Southern's lien position being valid and superior to all other claims, except those previously set forth in this order.

O R D E R

Pursuant to the foregoing IT IS THE ORDER OF THIS COURT that Great Southern Federal has a valid first priority interest in the $197,474.06 related to the building and the $285,986.14 related to the contents, less the sum of $1,917.00 due to Huttig Sash and Door. No other creditor having expressed an interest in the

$1,900.00 attributable to the mobile telephone/radio, the Court concludes that it comes under Great Southern Federal's blanket lien on all equipment of Daring Sales.

IT IS FURTHER ORDERED that Trust Company Bank is entitled to the $15,820.00 attributable to the computer purchased by Daring Sales in 1989.

Accordingly, the Clerk of Court is authorized and directed to pay to: 1) Great Southern Federal the sum of $483,443.20 plus all accrued interest thereon; 2) Huttig Sash and Door the sum of $1,917.00 plus interest attributable thereto; and 3) Trust Company Bank the sum of $15,820.00 plus any interest attributable thereto. The Clerk is authorized and directed to pay all registry fees assessable against the interest earned on these funds.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 30th day of November, 1990.